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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 184

THE GENERAL PROTECTIVE COMMITTEE FOR THE HOLDERS OF OPTION WARRANTS OF THE UNITED CORPORATION,

Petitioner,

v.

THE SECURITIES AND EXCHANGE COMMISSION, THE UNITED CORPORATION, EDWARD R. DOWNING, RANDOLPH PHILLIPS, and 22,081 STOCKHOLDERS OF THE UNITED CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF ON MERITS FOR RESPONDENTS RANDOLPH PHILLIPS, EDWARD R. DOWNING, AND 22,081 STOCKHOLDERS OF THE UNITED CORPORATION.

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Opinions Below.

The Findings and Opinion of the Securities and Exchange Commission (R. 1-70) approving the plan which is the subject of this proceeding, and the Memorandum Opinion and Order (R. 77) are not yet officially reported, but are set forth in Holding Company Act Release Nos. 10,614 and 10,643. The opinion of the Court of Appeals (R. 403) is reported in 203 F. 2d 611.

Jurisdiction.

The judgment and decree of the Court of Appeals was entered on March 31, 1953 (R. 426). A petition for rehearing was denied on April 22, 1953 (R. 446). The petition for a writ of certiorari was filed on July 16, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, made applicable by Section 24(a) of the Public Utility Holding Company Act of 1935, 15 U. S. C. 79x(a) (R. 84).

Petitioner Does Not State the Question as Stated by This Court.

The order of this Court dated October 12, 1953 reads:

> "The petition for writ of certiorari is granted limited to the question as to the jurisdiction of a court of appeals or a district court to review orders of the Securities and Exchange Commission."

Since this Court did not grant the petition by stating it was limited to "question No. 1" of the petition, which is the same question set forth in petitioner's brief, we interpret the above order as broadening the question presented as No. 1 in the petition and brief. We believe the "either-or" presented by the reformulated question implicitly disposes of one of the issues in this case, namely the right of the S. E. C. to split for review one order between two different courts. Respondents contend that such a split is improper.

Corrected Statement of the Case.

A. The plan is "a comprehensive plan."

The subject matter of this proceeding is "a comprehensive plan (of The United Corporation) under Section 11(e) of the (Public Utility Holding Company) Act to complete its transformation into an investment company" (R. 384). This is the S. E. C.'s description of the plan, repeating United's language on the cover caption of its application. (See unprinted transcript in No. 154, S. E. C. Doc. No. 1). United's plan was filed in compliance with a condition which the Commission inserted in the order on a prior proceeding that United

> "file, promptly and as its next step under the Commission's order of August 14, 1943 (13 S. E. C. 854), a comprehensive plan under Section 11(e) of the Act, detailing the remaining steps to be taken, and the timing thereof, to complete its transformation into an investment Company."
>
> *The United Corporation*, Holding Co. Act Release No. 9431 (Oct. 20, 1949), p. 9.

This condition was inserted into the 1949 order after respondent Phillips had complained that United had been dilatory in complying with the 1943 order. *Id.*, pp. 3, 6. Only after the S. E. C. decided to urge that its present order could be split for review did it stop describing the plan as "a comprehensive plan" under Section 11(e).

B. The 12 "provisions of the plan."

The S. E. C. listed 12 separately numbered "principal provisions of the plan" (R. 7-10) in its Findings and Opinion. In brief, these are:

(1) A cash offer of 95% of their shares' net asset value to holders of 99 shares or less of United's Common Stock (R. 7).[1]

(2) An offer to holders of 100 shares or more of United's Common Stock of the right to exchange their shares for shares of the Niagara Mohawk Power Corporation in the ratio of 5.8 shares of United for 1 of Niagara Mohawk Power Corporation Common Stock (R. 8).[1]

(3) A limitation of offers (1) and (2) to record stockholders on certain specific dates, and to a period of 14 days (R. 8).

(4) Sale thereafter during the next twelve months of the excess of United's remaining holdings of stock in the Niagara Mohawk Power Corporation until it held a maximum of 4.9% of the latter's voting stock (R. 8).

(5) Contingent permission for United to borrow $4,000,000 (R. 9).

(6) Cancellation of the outstanding option warrants entitling the holders thereof to purchase 3,732,059 shares of Common Stock at any time at a price of $27.50 per share (R. 9).

(7) Sale of all of United's holdings in stock of the South Jersey Gas Company (R. 9).

(8) Reduction by sale within 1 year of United's stockholdings in the Columbia Gas & Electric Corporation and United Gas Improvement Company to 4.9% of the voting stock of each of said companies (R. 9).

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[1] Provisions No. 1 and No. 2 constitute the withdrawal provisions of the plan which were included to meet the objection of respondent Phillips that, in the absence of dissolution, the plan would be unfair unless amended to include such a provision for withdrawal (R. 304-5). This was one of the issues at the 1947 annual meeting of the stockholders of The United Corporation, and respondent 22,081 stockholders owning 21% of the common stock supported Phillips in this and other proposals (R. 15,309,312).

ARGUMENT.

POINT ONE.

The provision permitting a split review by a court of appeals in one circuit and a district court in another circuit of one S. E. C. order, based on one record, and approving one "comprehensive plan", violates both Sections 11(e) and 24(a) of the Public Utility Holding Company Act by making impossible the preservation in either court of "exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part".

A. The provision violates Section 24(a).

An S. E. C. order subject to review under Section 24(a) of the Act can only be reviewed in the court of appeals within any circuit wherein the person or party aggrieved and seeking review "resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia". 49 Stat. 834, 15 U. S. C. 79x(a). This limits any one person seeking review to a maximum of 3 circuit courts in w ich to appeal.[18] If the District Court in which, under the S. E. C. and United's split-review theory, a subsequent enforcement of the order is sought in whole or in part, is located outside the circuits of these 3 courts of appeals, it is obvious that another court of appeals than the one appealed to in the first instance would review the district court order insofar as it affirmed, modi-

[18] In the present case the S. E. C. knew that Phillips resided and transacted his business in New York and Downing in Massachusetts. Both respondents had appeared jointly before the S. E. C. (R. 2) and the only court in which they could file, as they did, a joint petition for review was in the Court of Appeals for the District of Columbia Circuit.

(9) Amendment of United's Certificate of Incorporation to provide for cumulative voting at stockholders' meetings for election of directors (R. 9).[3]

(10) Amendment of United's By-Laws so as to raise the quorum requirement at stockholders' meetings to 50% of the voting stock (R. 9).[3]

(11) Payment by United of all fees and expenses incurred in connection with the plan, and any amendment thereto, subject to S. E. C. approval (R. 9).

(12) A request by United, pursuant to Section 11(e), that the S. E. C. "apply to a court in accordance with Section 18(f) of the Act to enforce" Nos. (6), (9), and (10) (R. 10).[4]

Upon completion of these 12 steps, United proposed to take 2 additional steps pursuant to the plan:

(13) To make an application for an order by the S. E. C. under Section 5(d) of the Act, declaring that United had ceased to be a holding company (R. 12-13).

(14) Upon issuance of the 5(d) order, to register under the Investment Company Act of 1940 as a "non-diversified, closed-end management company" as defined by that Act (R. 11).

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[3] Provision No. 9 was originally proposed as an amendment to the plan by Phillips at the 1947 annual meeting (R. 304-5).

[3] Provision No. 10 was also originally proposed by Phillips at the 1947 annual meeting (R. 304-5).

[4] Petitioners' brief omits to mention that the plan requires District Court enforcement of provisions Nos. 9 and 10, a requirement that negates their argument that only the holders of the option warrants have been deprived of the statutory notice and hearing provided by Section 11(e). There are 75,000 holders of the common stock (R. 35). Each has a right to notice and to be heard on these provisions. Respondents represent only 22,081 of these stockholders (R. 312).

fied, or set aside in whole or in part the S. E. C. order.[14] Thus the first court of appeals would lose to the second at least some of its "exclusive" appellate jurisdiction to affirm, modify or set aside the same order. Although in form the second court of appeals is not directly reviewing the S. E. C. order but the district court order thereon, the substantive result is the same and destroys the "exclusive jurisdiction" of the first court of appeals. This is a violation of Section 24(a).

Section 11(e) provides that "the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan". Section 18(f) provides that the Commission "may in its discretion bring an action in the proper district court of the United States, the Supreme Court of the District of Columbia (now called the District Court of the United States for the District of Columbia, see 49 Stat. 1921 Ch. 804), or the United States courts of any territory". A "proper district court" is indicated in Section 25 of the Act as one in which the company "is an inhabitant or transacts business." When the S. E. C. previously sought enforcement of an order relating to The United Corporation in a district court it filed its application in the District Court for the District of Delaware. See *Matter of The United Corporation*, 82 F. Supp. 196 (1949). Delaware is the State where United was incorporated (R. 3). Its only other address of record is in the State of New York, where its main office is (R. 296). It is clear therefore that the

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[14] The scope of review under Section 24(a) by a court of appeals and under Section 11(e) by a district court is identical. *S. E. C.* v. *Central-Illinois Securities Corp.*, 338 U. S. 96. That decision "involved the scope of review under Sections 24(a) and 11(e), holding the scope identical under the two sections". *Levinstiff* v. *S. E. C.*, 178 F. 2d at 337 (C. A. 2, 1949).

C. The amendments to the plan required by the S. E. C. to meet respondents' objections.

Respondent Phillips on behalf of himself and 22,081 associated stockholders, including respondent Downing, requested the S. E. C. to increase the cash payment in provision No. 1 of the plan to 100% of the net asset value, which the S. E. C. did (R. 35). Respondents also asked the S. E. C., over United's objection, to improve the exchange ratio in provision No. 2, which the S. E. C. did by a formula which worked out to 5.2 shares of United for 1 of Niagara (See 17th Annual Report of the S. E. C., 1951, p. 90) instead of the 5.8 for 1 proposed by United (R. 8). But despite this improvement respondents protested that the ratio was still inadequate since it did not give the stockholders owning 100 shares, or more, 100% of net asset value and actually resulted in forcing any stockholder accepting to take an immediate market loss. (See [illegible]1-12, this brief.) But respondents were prevented from obtaining a review of the fairness of this provision by the S. E. C.'s split review tactics. (See pp. 10-11, this brief.)

Respondents objected to a provision requiring stockholders to give notice to the company of any intended exercise of cumulative voting privileges, and also requested that the new quorum provision be inserted in the Certificate of Incorporation. The S. E. C. required both these changes to be made before finally approving the plan (R. 55-7).

D. Respondents' objections to the approved plan.[5]

In the proceedings before the S. E. C. and the court below respondent common stockholders objected to the plan upon the following grounds (R. 419-423):

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[5] These objections are the subject of a petition for writ of certiorari now pending before this Court, No. 154, October Term, 1953.

(1) The S. E. C. is required to dissolve United and distribute its assets to its stockholders, since it has found that United is an "economically unnecessary" company from whose "unnecessary corporate existence" both the public and United's stockholders have suffered. 13 S. E. C. 854 at 877. In this basic decision the S. E. C. concluded: "It seems clear that dissolution would be appropriate in this case." *Id.*, at 898-9.

(2) The legislative history of the Act, 3 judicial precedents in the Supreme Court, 4 in the Courts of Appeals, and 73 S. E. C. decisions all concur in holding that dissolution of an "economically unnecessary" holding company is mandatory under the Act.

(3) The statute requires that no plan shall be approved by the S. E. C. under Section 11(e) of the Act unless "the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b)." Since the S. E. C. has already found on substantial and uncontroverted evidence that both the public interest and the stockholders have suffered from "the unnecessary corporate existence" of United (13 S. E. C. at 877), it can not properly make the required statutory finding that continuation of United's "unnecessary corporate existence" in the form of an investment company is "necessary to effectuate the provisions of subsection b."

(4) There is no evidence in the record to support the finding that United's proposed extension of its controlling activities to other areas of the national economy than the public utility industry is "necessary to effectuate the provisions of subsection b."

(5) United's president and counsel should be removed from the management for acts of fraud and perjury.

(6) The provision for cumulative voting should be amended so as to provide that it can not be elimi-

nated in the future from the Certificate of Incorporation except by vote of holders of at least two-thirds, instead of a majority, of the voting stock.

(7) The plan, in its entirety, is not fair and equitable as required by Section 11(e), nor in compliance with Section 11(b)(2) of the Act.

(8) The administrative discretion of the S. E. C., if it existed, withholding the admittedly "appropriate dissolution" of United and approving its transformation into an investment company, can not be sustained in view of the admissions of United's president and counsel that they obtained leaks of the confidential judicial deliberations of the S. E. C. and thereafter privately "influenced" 2 members of the S. E. C. in the exercise of that discretion after the record was publicly closed. (See Petition in No. 154, Oct. Term, pp. 55-68, and R. 407-8.)

As we will show, it is improper to split the review of the single S. E. C. order approving the 12-provision plan and disapproving respondents' 8 objections between 2 courts in 2 different judicial circuits.

E. Respondents were unwillingly forced into the Court of Appeals by the S. E. C.'s tactics.

In its Findings and Opinion dated June 15, 1951 the S. E. C. stated:

> "7. Request for Court Enforcement.
>
> Assuming the plan is amended in accordance with this Opinion, the Commission will *promptly* seek appropriate court enforcement, pursuant to United's request, in accordance with Section 18(f) of the Act." (Our emphasis). (R. 69).

B. The provision for split review violates Section 11(e).

The plan over which the S. E. C. has jurisdiction under Section 11(e) is "a plan * * * for the purpose of enabling such company * * * to comply with the provisions of subsection (b)" of Section 11. 49 Stat. 822, 15 U. S. C. 79k(e). If the S. E. C. finds "such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan," the plan must be approved and the Commission, at the request of the company, may apply to a (district) court * * * to enforce and carry out the terms and provisions of such plan". The district court "after notice and opportunity for hearing" must find such plan "fair and equitable and as appropriate to effectuate the provisions of Section 11."

It is clear from this language that the whole plan, not 3 provisions out of 12, are to be submitted to the District Court. The comprehensive language, "a plan", "such plan", "*the* terms and provisions of such plan", make clear that Congress intended that the whole plan, not just a few of the terms and provisions thereof, should be submitted to the District Court.

The reason is obvious: a plan must be found to be "fair and equitable" as an entity, not only in part. Fairness and equity is a total sum only reached by adding all the parts together. To ask one court to look at some provisions and another court only at other provisions of one plan, deemed fair and equitable by the S. E. C. as a whole, is like asking an inspector of weights to determine if a scale is honest by checking only one balancing pan, instead of both.

On June 26, 1951, after United had filed the indicated amendments, the S. E. C. issued a Memorandum Opinion in which it reversed itself, *without any intervening hearing, or notice to Respondents, or attempt to obtain their views on the question:*

> "* * * In view of the possibility of appeals from the parts of the plan as to which enforcement has not been requested and of the development of problems with respect to the availability in the appropriate forum of the record in the proceedings before us, *we shall defer applying* for court enforcement for the time being." (Our emphasis). (R. 80).

Had the S. E. C. gone ahead "promptly" after June 15th, as it first stated it would do, there would have been no problem. Respondents herein would have immediately moved the District Court where enforcement was sought by the S. E. C. to assume complete jurisdiction over the entire plan and record.[6] Had the S. E. C. argued against such jurisdiction there would have been time to thrash the matter out before the District Court prior to the expiration of the 60-day period for filing petitions for review in the Court of Appeals under Section 24(a) of the Act. But by changing its decision without hearing and on the flimsiest of pretexts, the S. E. C. forced Respondents to move in the Court of Appeals if they were to avoid challenge by both S. E. C. and United's management of their right of appeal. Even then Respondents waited until August 23, 1951 (R. 406), the 57th day after the entry of the S. E. C. order, solely in order to give the S. E. C. a chance to move first in the District Court, and thus try to avoid the possibility of a split review. But the tactics employed by the S. E. C. frustrated such an orderly solution which might well have

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[6] See pp. 36-38, this brief.

made unnecessary the present case. This is the first time in the 18-year history of the Act that the S. E. C. has attempted to split the review of one order approving a single plan between two different courts.[7]

F. United's belated revelation of the true reason behind the split-review tactic.

The S. E. C.'s alleged reason in its Memorandum Opinion of June 26, 1951 for reversing without hearing its June 15th decision to apply "promptly" for district court enforcement became so transparently spurious when the issue was argued in the court below that the reason was abandoned. United counsel were forced in their brief below to make the following admission:

> "There was a compelling reason for such severance particularly with respect to the withdrawal offers. Had this feature of the Plan been brought before the District Court, a delay, possibly of many months duration, would have ensued. In the interval, changed conditions might have rendered the terms of withdrawal, which the Commission had held to be fair both to stockholders who withdrew and to those who remained, inappropriate and perhaps so discriminatory as to require a remand to the Commission." (Brief dated January 14, 1952, pp. 3-4.)[8]

The S. E. C. conceded the truth of this in its brief in this Court in opposition to the petition for writ of certio-

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[7] See p. 25, this brief.

[8] The weakness of United's "compelling reason" against district court review of the fairness of the withdrawal offers may be judged from the fact that a previous withdrawal plan for the preferred stockholders was enforced *at its request* in the district court after the usual automatic stay pending court scrutiny. See *The United Corporation*, 82 F. Supp. 196 (Del. 1949).

rari. (See pp. 23-4.) This makes clear the behind-the-scenes collaboration of the S. E. C. with United's management which resulted in the alteration without hearing of the June 15th decision. It is confession of a strategy to stampede the 22,081 opposition stockholders so that they would be deprived of the automatic stay of the S. E. C. order which exists because of the "notice and opportunity for hearing" provision in Section 11(e) with respect to review proceedings in the District Court. The average length of time in such Section 11(e) cases from the date the "initiating papers" are filed in the district court to the date of "entry or affirmance of enforcement order" is 6 months, according to a table prepared by the S. E. C. for Hearings before Sub-Committee of the Committee on Interstate and Foreign Commerce, titled "*Study of Securities and Exchange Commission*", Part 1, 82nd Cong., 2nd Sess., pp. 522-30.

Having deprived the opposition stockholders of this average automatic stay of 6 months, United now rushed its plan out to the stockholders so quickly that the withdrawal provision was in operation for its limited 14-day period within less than 3 weeks after entry of the June 26th order. (See. f. n. 9).

Yet if there ever was a withdrawal provison that merited the calm and unhastened scrutiny of a court of review, this one was the most likely candidate. If a stockholder of 100 shares or more withdrew under the plan's provisions, he immediately suffered a market loss of $24.30 per 100 shares. A holder of 1,000 shares suffered an immediate market loss of $243.00, and a holder of 10,000 shares of $2,430.00. United's largest stockholder, the St. Regis Paper Co. owning directly and through its nominee Barber, 665,700 shares (See unprinted transcript, Doc. No. 148, p. 6016, in No. 154,

October Term, 1953) would have suffered a loss of more than $145,000.[9]

No other withdrawal provision in any other plan ever approved by the S. E. C. resulted, as here, in an *immediate loss* of market value to the withdrawing stockholder.[10]

In short, the S. E. C. collaborated with United's management (consisting of 8 employees of whom 4 were former

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[9] See footnote 42, S. E. C.'s Findings (R. 46), and *The Wall Street Journal*, which commented on July 14, 1951 in the *Abreast of the Market* column:

> "Sometimes the theories advanced by the SEC under the Public Utility Holding Company Act result in strange situations. A case in point is the current offer by United Corp., whereby holders of 100 or more shares may exchange their stock for *Niagara Mohawk Power Corp.* common if they do not choose to go along with United's plan to become a closed-end investment trust. Under the terms of the offer, as prescribed by the SEC, stockholders who elect to accept the offer will receive only 97 percent of the net asset value of United's common stock, which in turn is around 5 percent below the market price for the stock. It is obvious that stockholders who want to make the exchange fare better by selling United common and buying Niagara Mohawk common in the open market. This is especially true in the case of stockholders owing 600 or more shares of United who would be entitled to 100 or more shares of Niagara Mohawk under the offer. Such stockholders would pay about 2 percent in commissions to sell United and about 1 percent to buy Niagara Mohawk, resulting in a total 'round trip' commission of 3 percent as compared with an 8 percent discount under the exchange plan. In view of the apparent disparity in United's offer, several major brokerage firms are advising customers against accepting the exchange offer."

[10] In *The United Corporation*, Holding Company Act Release No. 5440, a package of securities with a market value of $41.10 was offered for a preference share with a market value of $36.25, a profit incentive of $4.85 a share or $485 for a 100 share lot. In *The United Corporation*, Holding Company Act Release No. 8396, a package of securities with a market value of $48.44 was offered for a preference share with a market value of $44.75, a profit incentive of $3.69 a share or $369 for a 100-share lot. And finally in a plan approved on the same day as the June 15th, 1951 decision in United's case, a package of common stock securities with a market value of $151.25 was offered for common stock with a market value of $141.88, a profit incentive of $9.37, or $186.70 for a 100-share lot. *The United Gas Improvement Co.*, Holding Company Act Release No. 10624, at p. 17; see also No. 6474, p. 27.

S. E. C. officials (See Petition for writ of certiorari, No. 154, p. 9) so as to help maintain in this "economically unnecessary" company the maximum possible fund for new speculations by coercing the common stockholders against withdrawing on pain of suffering an immediate market loss; then having approved a device so obnoxious to fairness and equity, it withheld enforcement proceedings in the District Court so as to prevent such calm and unhastened judicial scrutiny of the device as would result from the automatic stay. This meant the opposition common stockholders, who for 4 years had fought for a withdrawal provision (R. 303-5), would be forced into the court of appeals where no such stay could be obtained as of right [See Sec. 24(b)] and where the court would in effect be asked to undo what was almost a *fait accompli* or else make up its mind by only a summary procedure on the merits whether or not to stay the withdrawal provision.

Respondents refused to accept this stampede tactic by the trustees of "other people's money" and by the great government agency founded to protect the public and investors, and preferred to let the "voluntary" withdrawal expire by limitation while preparing a considered and unhastened petition for review in the novel circumstances created, hoping thereby to illustrate by these events the additional stigmata of what was to them an already obviously illegitimate enterprise.

To date more than 2½ years have elapsed since the issuance of the S. E. C. order. Still no enforcement has been attempted by the S. E. C. of the cumulative voting and increased quorum provisions of the plan, thereby allowing United's management to enjoy undivided control of the board of directors without opportunity for representation of the minority stockholders.

The above pattern plainly illustrates the reason for the present avoidable situation.

G. Respondents' reservation of their claim that the district court had full jurisdiction.

Being in substance coerced by both the S. E. C. and United's management to seek review of the order in the Court of Appeals or else risk challenge, after the 60-day statutory period for review under Section 24(a) had expired, of their right to a review in the District Court, respondents on August 23, 1951 filed their petition for review below.[11] The petition, however, specifically made therein the following reservations:[12]

> "10. The Holding Company Act does not contemplate a proceeding wherein one part of the same record and one part of the same SEC order and one part of the same plan will be reviewed in a District Court and another part of the same record and of the same order and of the same plan will be reviewed in a Court of Appeals in a different circuit.
>
> "11. Petitioners allege that the failure of the SEC to file to date a petition for court enforcement in an appropriate District Court, as provided by Section 11(e) of the Holding Company Act, is motivated by an effort to split the review of the SEC proceedings among two courts in two different circuits so as to prevent any one Court of Appeals

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[11] Respondents could, of course, have gambled that the District Court would reject the S. E. C. and United's concept of its limited jurisdiction and would assume comprehensive jurisdiction over the "comprehensive" plan. But a statutory right of review is too precious to be made the subject of a gamble.

[12] The petition for review appears at page 1 of the unprinted transcript of the record in the Court of Appeals now before this Court on the petition for writ of certiorari in No. 154, October Term, 1953.

or District Court from reviewing the entire case on the entire record. In view of the unique situation created by the SEC's action and its failure promptly after entry of its June 26 order to seek enforcement of it in the appropriate District Court—which in the past has been designated by it as the District Court for the District of Delaware, the State of United's incorporation—petitioners, if they are to preserve their rights of review under Section 24(a) of the Holding Company Act, are required to file this petition herein, and prior to any opportunity to have a determination made as to whether the District Court has complete and comprehensive jurisdiction to review in the first instance the order and proceedings herein challenged. The filing of this petition for review, therefore, is not to be construed as a waiver of any rights petitioners may have in this respect, nor any rights they may have under the Administrative Procedure Act or the Holding Company Act to apply in this or any other court for a mandatory or prohibitory injunction or for any other appropriate relief."

H. Respondents urged the Court of Appeals to reject the S. E. C.'s tactic for a split review.

In an attempt to bring the jurisdictional issue promptly to a head and avoid the more than 2-year delay that has now resulted from the S. E. C.'s tactic, respondents made the following motion in their petition for review:

"12. * * * In view of the agreement of all parties to the S. E. C. proceeding to the provisions for cumulative voting and for increase in the quorum requirements, petitioners move that this court enter an order forthwith enforcing these amendments to the Certificate of Incorporation of The United Corporation (i. e., provisions Nos. 9 and 10). The entry now of such an order is asked without prejudice to

petitioners' requests for other modifications to the Certificate of Incorporation should this Court find that dissolution of United is not required.

* * * * * * *

"16. Upon the facts alleged in Nos. 6 through 12 above, petitioners respectfully move this court for an order permanently staying the S. E. C. and The United Corporation from seeking to enforce its order of June 26, 1951 and the plan approved pursuant to said order, or any part thereof, in any other court * * *."

Both the S. E. C. and United opposed the motions and the court below denied them on November 9, 1951, without opinion, and "without prejudice to renewal at the hearing on the merits" (R. 407).

At the hearing on the merits held on February 12, 1952, respondents renewed their motions. They, however, broadened their motion to enforce so as to include enforcement of the provision relating to the option warrants, since the option warrant committee had asked permission to intervene. The motions were again denied in the decision on the merits issued on March 31, 1953 (R. 407). The court found that "we do not have power to enforce a plan of compliance which has been approved by the Commission" (R. 407). But the court sustained its right to review the provisions reserved by the S. E. C. for District Court enforcement:

> "Accordingly, we think that, so long as a petition to review its order of approval has not been filed with a court of appeals under § 24(a), the Commission may apply under § 11(e) to a district court to enforce an approved plan, whereupon the exclusive jurisdiction of the district court attaches; the Commission's order cannot then be reviewed by the court of appeals on the petition of an aggrieved party which is subsequently filed. On the other hand, so

long as the Commission has not applied to a district court to enforce an approved plan, any person aggrieved by the proposed reorganization may petition a court of appeals to review the Commission's order of approval. Thereupon, that court has exclusive jurisdiction to affirm, modify or set aside the order, and the Commission cannot apply to a district court for enforcement until the court of appeals has entered judgment affirming or modifying the plan.

"It should be observed that a court of appeals has no power to enforce a plan of compliance; when it has affirmed or modified a Commission order of approval, the Commission may then apply to a district court to obtain enforcement. In that event, the district court has no function except to enforce, since affirmance by the court of appeals necessarily held the plan necessary to effectuate the provisions of § 11(b) and fair and equitable to the persons affected thereby, and its ruling is *res judicata* as to those questions" (R. 416-417).

The court then proceeded to affirm the entire comprehensive plan, including the provisions relating to cumulative voting, the quorum requirement, and to the cancellation of the warrants.

Respondents disagree with these findings to this extent: the review and enforcement of a single order based on a single record approving a single comprehensive plan can not be split under the Act between 2 different courts in 2 different circuits. Either the District Court has complete and comprehensive jurisdiction to review the order herein and enforce it, or the Court of Appeals has complete and comprehensive jurisdiction to review the order and there is no need for a district court to enforce it.

Summary of Argument.

The provision permitting a split review by a court of appeals in one circuit and a district court in another circuit of one S. E. C. order, based on one record, and approving one comprehensive plan of compliance with Section 11(b), violates Sections 11(e) and 24(a) of the Public Utility Holding Company Act by making impossible the preservation in either court of "exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part."

When a final comprehensive plan has been approved as fair and equitable as a whole by the S. E. C., it is improper to ask 2 different reviewing courts to judge the fairness and equity of the parts, and whether they should be modified as the result of objections, in isolation from each other. Such a procedure would frustrate "the uniform application of the 'fair and equitable' standard which Congress undoubtedly had in mind" and would "create to a very larger possible extent different standards" and "incongrous results." *S. E. C.* v. *Central-Illinois Corp.*, 338 U. S. at 123.

The attempt to split the review violates the S. E. C.'s admittedly "normal procedure" in the 86 cases in the district court under Section 11(e) prior to this one, and results from improper management and administrative motives. This abnormal procedure would unnecessarily double the burden of time and expense upon the courts and the parties, is an abuse of administrative discretion, is dilatory, and violates the statutory requirement of expeditious compliance.

Since the Public Utility Holding Company Act is "a specific overriding federal law" and no surrender of securities is required of the warrant holders, or the stockholders, and neither the company nor the S. E. C. has asked for the

appointment of a trustee, a district court enforcement proceeding is not "necessary" within the meaning of Section 11(e). There is, therefore, no need to "mobilize the judicial authority" of a district court "as a court of equity." The order of the S. E. C., upon final affirmation by the court of appeals, provides the company's management with all the authority it needs to make the plan effective, and the record is bare of any evidence to the contrary.

If enforcement of the 3 provisions by a district court is held statutorily "necessary", then the district court has "exclusive jurisdiction" over the entire plan. To rule otherwise would not only violate Section 11(e) but the well-settled rule that a court of equity "ought to do justice completely and not by halves". The S. E. C. found the plan fair and equitable as a whole because each of the parts in relation to the whole made it that way. Congress intended by the language of the statute that the district court look at the plan as a whole, and there is nothing in the legislative history to suggest to the contrary.

S. E. C. by bringing an enforcement proceeding where the company is an inhabitant or transacts business, namely Delaware or New York, would be bringing it in a court whose action is not reviewable in the Court of Appeals for the District of Columbia Circuit, the court which has already reviewed the order in question. Thus an inevitable conflict of the circuits would result, and the "exclusive jurisdiction" of the Court of Appeals for the District of Columbia would be infringed.

The S. E. C. could, under Section 18(f), seek enforcement in the District Court for the District of Columbia, a course which it has already rejected.[15] There would then be at least no conflict between the circuits but the Court of Appeals for the District of Columbia Circuit would be in the position of having to review twice the same S. E. C. order, an intolerable situation and one unnecessarily burdensome in time and money to all the parties.[16]

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[15] The S. E. C. in a letter by then General Counsel Roger S. Foster to Randolph Phillips, dated December 3, 1951, rejected the latter's suggestion that an enforcement proceeding be brought in the District Court for the District of Columbia. "The Commission regards the United States District Court for the District of Delaware as a proper court in which to institute enforcement proceedings," its counsel stated.

> "It does not deem it appropriate to bring enforcement proceedings in the District Court for the District of Columbia." (See Motion for an Order Enforcing the Uncontested Provisions of the Plan and the Provision Relating to the Option Warrants, page 7, in the unprinted transcript of the record now before this Court in No. 154, October Term, 1953.)

[16] A second review would be inevitable if new objections to the 3 provisions to be enforced in the district court were denied by that court and were made and appealed by any one of the 75,000 stockholders not represented by respondents or by any one of the holders of that 68% of the warrants not represented by petitioners (Petitioner's brief, p. 19). *Application of S. E. C.*, 50 F. Supp. 965, 966, Del. 1943, did not "raise any issue not already ruled (upon) by the circuit court of appeals". It cannot properly be argued therefore that new objections by new parties would be *res judicata*. Yet this in effect is what the court below asserts (R. 417).

The court below endeavored to solve the difficulty presented by the split-review tactic of United and the S. E. C. by depriving the District Court of any reviewing function:

> "It should be observed that a court of appeals has no power to enforce a plan of compliance; when it has affirmed or modified a Commission order of approval, the Commission may then apply to a district court to obtain enforcement. In that event, the district court has no function except to enforce, since affirmance by the court of appeals necessarily held the plan necessary to effectuate the provisions of § 11(b) and fair and equitable to the persons affected thereby, and its ruling is *res judicata* as to these questions" (R. 417).

This stripping of the District Court's reviewing function is a denial of its statutory role under Section 11(e) to adjudicate in the first instance, prior to any adjudication by a court of appeals, the necessity and fairness and equity of the plan.

The "notice and opportunity for hearing" in the District Court, provided by Section 11(e), permits any one of the 75,000 odd stockholders not represented by respondents in the court below, as well as the 22,000 represented by them, to appear and become parties and to object to the 3 provisions and to seek either their defeat or improvement on grounds of "fairness and equity" and statutory "necessity." In doing so they may advance new grounds for the dissolution of United, for example, not previously decided by the Court of Appeals, or ask for additional modifications to the plan. There may appear a new warrant holder from among those persons holding 68% of the warrants who are not represented by petitioner. The same considerations would apply to such parties. We agree therefore with petitioner that the "exclusive jurisdiction" of the Court

of Appeals can not be preserved by reducing the District Court to a rubber stamp without any judicial function except to sign the order enforcing the plan.

We disagree, however, with petitioner's argument that only the holders of the warrants would be entitled to notice and opportunity for hearing in the district court. Obviously the statute applies to United's 75,000 stockholders and the provisions of the plan relate to their stock. That necessarily means the entire plan must be scrutinized in the district court, not merely the warrant provision.[17]

C. The provision for split review violates "the normal procedure" in 86 prior cases.

During the 18 years prior to the date of the order herein the S. E. C. filed in various district courts no less than 86 applications under Section 11(e) to enforce "voluntary plans to comply with Section 11(b)" of the Act. See *17th Annual Report of the S. E. C.*, for the fiscal year ended June 30, 1951, Table 21, p. 259. The Commission admitted in its brief in opposition to the petition for writ of certiorari:

> "This is the first instance in which the Commission has been confronted with a request by the company for district court enforcement only of a portion of a plan when there was also a contest over other provisions in a plan. Generally, the normal procedure is to frame the plan in such a way that review will be had in only one court; or the plan is split into two or more steps and each step successively approved by separate order" (p. 23).

[17] Petitioner throughout its brief omits to mention that the plan provides for enforcement in the district court of the cumulative voting and quorum provisions. Whether petitioner regards these provisions as "voluntary" or "compulsory" under its theory is not made clear. Obviously, whichever court reviews the warrant provision must review these provisions.

D. The S. E. C. abused its discretion in approving the provision of the plan for split review because it unnecessarily doubles the burden of time and expense upon the courts and parties.

Section 11(e) of the Public Utility Holding Company Act provides that the S. E. C. "at the request of the company, *may* apply to a court, in accordance with the provisions of subsection (f) of Section 18, to enforce and carry out the terms and provisions of such plan." The language is purely permissive, it is not mandatory that the S. E. C. enforce the plan by application to a district court. In *Phillips* v. *S. E. C.*, 153 F. 2d 27, 29, 30 (cert. den. 328 U. S. 860) the Court of Appeals for the Second Circuit stressed "the very permissive wording of the statute", referring to the word "may" in Section 11(e). It would thus appear that the S. E. C. abused its discretion in approving one provision (No. 12) of the plan that provided for district court enforcement while approving other provisions which under its view of the case could only be reviewed in a court of appeals. To split the review is an abuse of discretion for the simple reason that it imposes an *unnecessary* burden and expense upon the courts and the parties by doubling the proceedings and the work. This much is in effect admitted in the S. E. C.'s alleged reason for withholding immediate enforcement in the district court, namely "problems with respect to the availability in the appropriate forum of the record in the proceedings before us."

The S. E. C. under Section 11(e) may approve the plan "as submitted or as modified". Thus it could have disapproved provision No. 12 of the plan for enforcement of provision Nos. 6, 9 and 10 in the District Court, or modified it so as to make the entire plan subject to review and enforcement in the district court. Instead it split the review, as requested by the company, for the first time in 18-years

operation under Section 11, thereby unnecessarily inviting the present complications in this case.

The S. E. C. further abused its discretion by altering its original Findings and Opinion, without hearing or opportunity for respondents to express their views on the point, so as to eliminate its Finding that, upon the company's request, it would apply "promptly" in the district court for an enforcement order. (See pp. 8-9, this brief.) The subsequently inserted finding in the Memorandum Opinion and Order of June 26, 1951 that there was "the possibility of appeals from the parts of the plan as to which enforcement has not been requested and of the development of problems with respect to the availability in the appropriate forum of the record" was not based on any statement in the record by the indicated appellants. Respondents and the petitioner also, we believe, were only too willing to cooperate with the S. E. C. to avoid such "problems". Had the S. E. C. moved "promptly" for enforcement, respondents would immediately have moved the district court to assume comprehensive jurisdiction over the entire plan.

E. Petitioner's division of the provisions of the plan into "voluntary" and "compulsory" is without statutory validity.

Petitioner makes an effort to sustain the split-review theory by arbitrarily dividing-up the provisions of the plan as "voluntary" and "compulsory" and then making them separably reviewable in 2 different forums.[18] This assumes

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[18] Under "voluntary" plans "no one is forced to surrender any rights against his will," says petitioner (p. 8). But the provision for non-cumulative voting now in the charter is being surrendered by the majority stockholders to satisfy the minority's demand for cumulative voting. How does petitioner know this charter amendment is not against the will of any majority stockholder? The 1947 proxy contest showed it was (R. 15, 303).

that it is proper to slice one record up into 2 different parts or else put blinders on one court's eyes so that it will not look at that part of the record which the other court is to review. Petitioner does not enlighten us as to the court to which they would allocate for review a question of law or fact in which both a stockholder and a warrant holder challenge the S. E. C. on procedural or other grounds common to both the "voluntary" and "compulsory" features of a plan. Nor does it state which court should review, for instance, No. 6 of respondents' objections to the plan (pp. 7-8, this brief). This objection relates to a feature of the plan reserved by the S. E. C. for enforcement in the district court, which feature petitioner says should be reviewed in the Court of Appeals as a "voluntary" feature.

Petitioner states that the "features of United's plan (for example, its continued existence as an investment company) by which the petitioning stockholders below claimed to be aggrieved" (Petitioner's brief, p. 8) are "voluntary" and therefore distinguishable for review. This overlooks the actual fact of record that United is not an investment company but a registered public utility holding company (R. 2) and ignores respondents' entire argument in No. 154, now pending before this Court, that the Holding Company Act *compels* dissolution of United since, among other reasons, the S. E. C. has found it to be an "economically unnecessary company" from whose "unnecessary corporate existence" both its stockholders and the public interest have suffered. 13 S. E. C. 854 at 877. Thus if the Court of Appeals had held that dissolution was compelled by the Act, petitioner would be forced to argue that the review should have been made in the district court. By making the jurisdictional question of the forum for review depend on determination of the substantive ques-

tion of whether a plan is "voluntary" or "compulsory", petitioner would make every appellant, who wanted modifications or the order set aside, speculate as to which forum the law required him to go. Instead of the procedure for review being a certainty, it would become a nightmare of speculations, making it possible to duplicate the present snarl-up an indefinite number of times in the future.

There is no need for such speculation. The statute is clear. The only time it is necessary to bring a district court enforcement proceeding under the statute is when "at the request of the company" the Commission deems it in its discretion appropriate to apply. Without a company request, there can be no district court proceeding under Section 11(e).[19]

F. The S. E. C.'s failure "promptly" to seek District Court enforcement was in violation of its statutory duty to obtain "expeditious compliance".

The minority stockholders of United, some 22,000 in number represented by respondent Phillips, won the rights of cumulative voting (provision No. 9) and increased quorum requirements (No. 10) after a bitter contest with the management starting at the annual meeting in 1947

[19] In using the term "voluntary plan" petitioner's brief reverse its meaning as long established in 86 prior cases under the Act. Thus in its annual reports, the S. E. C. refers to district court enforcement plans enforced in district court proceedings under Section 11(e) as "voluntary plans". See Table 31 entitled "Actions to enforce voluntary plans under sec. 11(e)," listing all district court actions for the fiscal year ending June 30, 1948, in 14th Annual Report of the S. E. C., pages 201-2, and page 25, this brief. Petitioner describes district court plans as "compulsory" (p. 9) and plans reviewable under Sec. 24(a) as "voluntary". This has no basis in practice or in the legislative history. See that history, insofar as it refers to "voluntary plans", as summarized in *In re Engineers Public Service Co.*, 168 F. 2d at 729 (C. A. 3) (1948), and confirmed by this Court's reference to 11(e) plans enforced in the District Court as "voluntary plans", *S. E. C.* v. *Central-Illinois Corp.*, 338 U. S. at 115.

(R. 303, 15) and ending with the management's being forced to incorporate such provisions in the plan approved by the S. E. C. on June 15, 1951. Yet more than 2½ years have passed without the S. E. C. taking a single step to enforce these rights for the stockholders who to date still do not enjoy them. This is a violation of the S. E. C.'s statutory duty:

> "In order to approve a plan under Section 11(e) of the Act we must find that it is necessary to effectuate the provisions of 11(b) and fair and equitable to the persons affected by it. We have often said that the 'necessity' standard means that the proposal must constitute an appropriate method of achieving a necessary result. The mere fact, however, that a proposal will bring the applicant closer to compliance does not necessarily mean that it is appropriate. It must be tested by whether, in the light of all existing circumstances, it accomplishes what can reasonably be accomplished in achieving the ultimate result and does so in an economical, fair and expeditious manner * * *.
>
> "'On the basis both of plain logic and the basic principles of statutory construction, we deem it indisputable that the steps or action we must find 'necessary' within the meaning of Section 11 are such as seem to us designed to ensure effectuation of the provisions of the Section most effectively and promptly.' (Underlining by S. E. C.) *Electric Bond and Share Company*, 11 S. E. C. 1146, 1217 (1942)."
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> *The United Corporation*, Holding Co. Act Release No. 9431 (1949), at p. 3.

In the present decision, before its alteration, the S. E. C. stated on June 15, 1951 that "since the Act requires expeditious compliance, it would be inappropriate to delay for thirty days the effective date of our order approving the plan" (R. 70).

It can not be disputed that for 57 days after the entry of the June 26th order there was no legitimate impediment to prevent the S. E. C. from "promptly" seeking district court enforcement as it had promised in its Finding and Opinion dated June 15, 1951 (pp. 8, 9, this brief). From June 26 until August 23, 1951 no petition for review of the order was filed in any court under any section of the Act. Thus for these 57 days the S. E. C. sat by idly and unnecessarily invited a jurisdictional issue which might never have arisen had it "promptly" filed as promised the application for enforcement.[20]

Section 11(b) states: "It shall be the duty of the Commission, as soon as practicable after January 1, 1938" to require a holding company to comply with Section 11(b) of the Act. In delaying its action for 57 days when there existed in fact no legitimate impediment to prompt enforcement the S. E. C. violated its statutory duty as emphasized by itself "to ensure effectuation of the provisions of the Section most effectively and promptly."

G. The procedure here attempted would frustrate "the uniform application of the 'fair and equitable' standard", and would "create to a very larger possible extent differing standards" and "incongruous results".

The considerations which urged this Court to reject a double standard for review in *S. E. C. v. Central-Illinois Corp.*, 338 U. S. 96, 123-5 are very much in point here, as summarized by the above heading. Instead of obeying the rule there set down, the S. E. C. now would do the very

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[20] Circuit Judge Jerome N. Frank, a former S. E. C. chairman, noted in *Leventritt v. S. E. C.*, 178 F. 2d 336, at 337-8, that the S. E. C. can file an enforcement petition in the district court within minutes after issuing its own decision. By this maneuver, he notes, the S. E. C. is able to pick the court of appeals which will ultimately review the case. This lightning speed possible in other cases is in stark comparison to the slow-motion attempted here.

reverse. Yet this Court said that Section 11(e) should not be read in comparative isolation but with "an effort toward harmonizing the section with §24(a) and bringing the two as close together as possible in practical operation." Here we have isolation and disharmony doubly compounded.

POINT TWO.

Since the Public Utility Holding Company Act is "a specific overriding federal law" and no surrender of securities is required of the warrant holders, or the stockholders, and neither the company nor the S. E. C. has asked for the appointment of a trustee, a district court enforcement proceeding is not "necessary" within the meaning of Section 11(e).

The warrant holders are not required under the plan to surrender their securities or to accept other securities in exchange for them. Therefore there is no need to "mobilize the judicial authority" of a district court "as a court of equity" to enforce the provision of the plan relating to the warrants. As this Court said in *S. E. C.* v. *Central Illinois Corp.*, 338 U. S. 96, 125 (1949):

> Indeed we think it is fair to conclude that *the primary object* of §11(e) was not to provide a highly different scope of judicial review from that afforded by §24(a), but was to enable the Commission, by giving it the authority to invoke the court's power, to mobilize the judicial authority in carrying out the policies of the Act. To do this the court "as a court of equity" was authorized to take exclusive jurisdiction and possession of the company or companies and their assets and to appoint a trustee to hold and

administer the assets under the court's direction. (Emphasis supplied.)

That case further held that Section 11(e) should not be read in comparative isolation but with an "effort toward harmonizing the section with §24(a) and bringing the two as close together as possible in practical operation" (122-123). It is obvious that no trustee is sought or needed to call in and cancel the warrants.[21] The order of the S. E. C., affirmed by the court of appeals, is just as effective an agent of cancellation of the "bare right to secure delivery" of United's stock as the order of the S. E. C. affirmed by a district court. Either order bars the company from giving recognition to the warrants if they should ever be presented. Their cancellation needs no more of an enforcement order than dead leaves do in order to fall to the ground.

There is also no difficulty with respect to making effective the cumulative voting and increased quorum requirements without a district court enforcement proceeding. The company must adopt the provisions if its future meetings are to be lawful and it is to receive the remaining relief from the S. E. C. and the Act which it desires. Under Delaware law the Certificate of Incorporation can be amended by a vote of the holders of a majority of the voting stock so as to provide for increased quorum requirements and cumulative voting. Section 26, Delaware Corporation Law (R. 56). Only if the holders of a majority of the company's stock should disobey these requirements of

[21] The S. E. C. decision states:

"The option warrant confers no right or interest in the present assets and earnings of United; it merely affords a bare right to secure delivery of United common stock upon tender of the subscription price so long as the company remains in existence, with no right to require earnings to be applied to improve the value of the common stock which the holder has the option to purchase" (R. 48).

the approved plan and not adopt these provisions by the requisite vote would it be necessary to seek a court order.[22] Even, however, without a stockholders' vote, the Certificate of Incorporation and the By-Laws must be deemed amended to include these provisions since "whatever the situation under Delaware law, it is clear that the Public Utility Holding Company Act is a specific overriding federal law which obviously must control or else its very reason for existence is frustrated." *Phillips* v. *S. E. C.*, 153 F. 2d 27 (C. A. 2, 1946) affirming *The United Corporation*, 17 S. E. C. 404, *certiorari denied*, 328 U. S. 860 (1946).

Section 11(e) provides that the district court "as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company * * * and the assets thereof; and the court shall have jurisdiction to appoint a trustee, etc." The above discussion makes clear that it is not "necessary" to procure the aid of the district court "as a court of equity" for the purpose at hand, since no "possession * * * of the assets" and no trustee is required to effect them. Since it is not "necessary" for the district court to do these things to effect the provisions of the plan, there is no power inherent in it with respect to the S. E. C. order that is not inherent in the court of appeals, this court having decided in the *Central-Illinois* case that the scope of review under 24(a) and 11(e) is identical. Finally, since

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[22] If the management, by means of its control of the proxy machinery, solicited proxies to vote in favor of such amendments, their rejection would seem most unlikely, especially since the minority stockholders led by Phillips, who originated these proposals (R. 303-5), would obviously try to make such support unanimous. There is nothing in the record to indicate that the management will have any difficulty in thus making the amendments effective in the ordinary corporate manner.

it is not necessary to "mobilize the judicial authority" of the district court as a "court of equity", it is not necessary to give any further notice or opportunity for hearing than has already been had before the S. E. C. and the court of appeals.[33]

The request therefore by the company for district court enforcement was unnecessary, was unsupported by evidence, and it was unnecessary for the S. E. C. to approve it.[34] Upon remand to it, the S. E. C. should strike that provision from the plan if the company does not withdraw it.

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[33] Petitioner, representing 32% of the warrant holders, expressly represented in the court below: "The assumption of jurisdiction by this court of the entire order of the Commission will expedite an early final determination of the case since this Court, by its orders of November 5, 1951, has evidenced its intention of expediting the matter, and since this Court has jurisdiction under Section 24(a) of the Act to settle the matter finally without sending it back to the Commission for further proceedings" (R. 258-9). Incidentally, it should be noted, there is no novelty in a court of appeals enforcing an order of an administrative agency. As this Court observed in *N. L. R. B.* v. *Pittsburgh Steamship Co.*, 340 U. S. at 502, "Congress has charged the courts of appeals * * * with the normal and primary responsibility for granting or denying enforcement of Labor Board orders."

[34] There is now pending before this Court a petition for writ of certiorari by respondents herein on other questions in this case. See petition in No. 154, October Term, 1953. Respondents recognize that as the losers on these questions before the lower court, it might be considered in some quarters poor litigation strategy to uphold the jurisdiction of that court. But the public interest and that of the security holders demand expedition of the case and frustration of the S. E. C.'s and United's dilatory tactics. Once the question herein is resolved, we assume the way will be cleared for determination of the pending petition. Respondents are content to rely on that petition.

POINT THREE.

If enforcement of the 3 provisions by a district court is held statutorily "necessary", then the district court has "exclusive jurisdiction" over the entire "comprehensive plan".

Under (A) and (B) of Point One we have already briefed the specific considerations that apply here. There remains to be added only some general considerations.

This Court has stated:

> "• • • 'a court of equity ought to do justice completely and not by halves,' and to this end, having properly acquired jurisdiction of the cause for any purpose, it will ordinarily retain jurisdiction for all purposes, including the determination of legal rights that otherwise would fall within the exclusive authority of a court of law."
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> *Rice & Adams Corp.* v. *Lathrop*, 278 U. S. 509, 515.

It would be an unfortunate precedent, after "the normal procedure" of 86 prior cases, for this Court to countenance a split review in 2 different circuits of a single order based on one record approving one comprehensive plan of reorganization.[25] It would be violative "of the well settled rule that a court of equity, having once taken jurisdiction, will do complete justice in the premises. See *Young* v.

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[25] This did not even occur in the exceptional case of *L. J. Marquis & Co.* v. *S. E. C.*, 134 F. 2d 822 (C. A. 3, 1943), and *Application of S. E. C.*, 50 F. Supp. 965 (D. Del. 1943), where one order was reviewed in the same circuit, first in the court of appeals, whose ruling was then held *res judicata* in the district court since the application did not "raise any issue not already ruled (upon) by the circuit court of appeals" 50 F. Supp. at 966.

Higbee Co., 324 U. S. 204, 214, 65 S. Ct. 594, 89 L. Ed. 890; *S. E. C.* v. *U. S. Realty & Improvement Co.*, 310 U. S. 434, 455, 60 S. Ct. 1044, 84 L. Ed. 1293." *Chase* v. *Austrian*, 189 F. 2d 555, 556-7.

Since this Court has already decided in *S. E. C.* v. *Central Illinois Corp.*, 338 U. S. 96, 124-5, that the scope of review is the same under 11(e) and 24(a) there would be no legitimate reason to deprive the district court of its "exclusive jurisdiction" over the order. Not to grant this "exclusive jurisdiction" would precipitate a condition where "the consequences would be, in effect, to create to a very large possible extent differing standards for administration and application of the Act, depending upon which mode of review were invoked." *Id.*, at 123. "Both sections are parts of the same statute, designed to give effect to the same legislative policies and to secure uniform application of the statutory standards. That statutory context and those objects should outweigh any general considerations * * * leading * * * to incongruities and diversions in practical application of the Act's, terms and policies."

The possibility that the S. E. C. could have split the plan "into two or more steps (with) each step successively approved by a separate order" because "piecemeal plans are proper" (Pet. Br. 20) is of no help here.[28] Compare this with the S. E. C.'s previous findings in 1949, with respect to United, that the "damage of a piecemeal pro-

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[28] Obviously, preliminary plans of compliance with Section 11(b) might be and are done piecemeal because the administrative control of the company has still to run its course under the section. But this is not true of the present plan which is a comprehensive and final plan. It is described repeatedly in the S. E. C.'s Findings as a plan "to complete" the transformation of United into an investment company (R. 7, 384).

gram at this time is a cumulative one", as a result of which it ordered filing of the present plan "to complete" compliance. *The United Corporation*, Holding Co. Act Release No. 9431, p. 6. The S. E. C. found the plan fair and equitable as a whole because each of the parts in relation to the whole made it that way. It obviously found non-dissolution of the company and transformation into an investment company fair and equitable because for one reason an opportunity for representation on the board is afforded minority stockholders through cumulative voting. Thus the cumulative voting provision is not separable from the provision permitting the transformation. It could not now find non-dissolution fair and equitable absent the cumulative voting provision. Yet that is what petitioners in substance propose be done by either the S. E. C. or a court or both. That means the Court of Appeals would have to reconsider its decision on a record which did not include such a cumulative voting provision. In short, petitioner's proposal that the order now be considered severable simply makes more complicated an already sufficiently complicated procedure.

Conclusion.

The only proper course under the statute is a remand of the case to the S. E. C. with directions to order either the submission of the entire comprehensive plan to the district court or the deletion of the provision for district

court enforcement. The judgment of the court below should be reversed or modified so as to require this result.

Respectfully submitted by,

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